

STATE OF MICHIGAN
IN THE SUPREME COURT

DAIMLERCHRYSLER CORPORATION,

Supreme Court
Docket No. 130106

Petitioner-Appellant,

Court of Appeals Docket No. 262518

v

MICHIGAN DEPARTMENT OF
TREASURY,

Hon. Kirsten Frank Kelly
Hon. Patrick M. Meter
Hon. Alton T. Davis

Respondent-Appellee.

MTT Docket No. 295872
Hon. Patricia Halm

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PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS
APPLICATION FOR LEAVE TO APPEAL

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**STATEMENT OF JURISDICTION AND
GROUNDS FOR APPEAL TO THE SUPREME COURT**

A. Jurisdiction

Petitioner-Appellant's *Supplemental Brief* is furnished at the express request of this Court in further support of its *Application for Leave to Appeal* ("Application"), previously filed with the Michigan Supreme Court under MCR 7.302 from the published *per curiam* decision of the Michigan Court of Appeals (the "*Opinion*") dated November 1, 2005, issued by the Honorables Kirsten Frank Kelly, Patrick M. Meter, and Alton T. Davis. Additional particulars relative to this Court's jurisdiction of this matter are fully set forth in Petitioner-Appellant's *Application*.

B. Grounds for Application Under MCR 7.302(B)(1), (2), (3) and (5)

Petitioner-Appellant refers this Court to the grounds for appeal referenced in its earlier-filed *Application*, and incorporates by reference its discussion of applicable grounds in this *Supplemental Brief*.

STATEMENT OF QUESTIONS PRESENTED

In addition to the *Questions* presented for review by this Court identified in its *Application*,

Petitioner-Appellant submits the following questions:

I. WHETHER THE MICHIGAN DEPARTMENT OF TREASURY'S OWN ADMINISTRATIVE PRONOUNCEMENTS AND PUBLICATIONS CONFIRM THAT DAIMLER IS ENTITLED TO ITS CLAIMED REFUND OF MOTOR FUEL TAX?

Petitioner-Appellant says "Yes."

Respondent-Appellee says "No."

The MTT would say "No."

The Court of Appeals would say "No."

II. WHETHER AVAILABLE LEGISLATIVE HISTORY RELATING TO THE ADOPTION OF THE NEW MOTOR FUEL TAX ACT, 2000 PA 403, CONFIRMS THAT THE LEGISLATURE DID NOT INTEND TO REMOVE ANY PREVIOUSLY-AVAILABLE EXEMPTIONS OR REFUND OPPORTUNITIES?

Petitioner-Appellant says "Yes."

Respondent-Appellee says "No."

The MTT would say "No."

The Court of Appeals would say "No."

III. WHETHER AN EXAMINATION OF CASE LAW GUIDES THE CONCEPT THAT THE LAWFUL IMPOSITION OF MICHIGAN MOTOR FUEL TAX IS DEPENDENT UPON OPERATION OR PROPULSION OF A MOTOR VEHICLE OVER MICHIGAN PUBLIC ROADS OR HIGHWAYS?

Petitioner-Appellant says "Yes."

Respondent-Appellee says "No."

The MTT would say "No."

The Court of Appeals would say "No."

IV. WHETHER THE IRREBUTTABLE PRESUMPTION STATED IN MCL 207.1026(1) APPLIES TO DAIMLER?

Petitioner-Appellant says "No."

Respondent-Appellee says "Yes."

The MTT would say "Yes."

The Court of Appeals would say "Yes."

V. *WHETHER THE LEGISLATURE’S USE OF THE PHRASE “AN END USER” IN MCL 207.1039 INCORPORATES ALL TYPES OF END USERS, AND IS NOT INTENDED TO REFER SOLELY TO THE ULTIMATE, OR FINAL, END USER?*

Petitioner-Appellant says “Yes.”

Respondent-Appellee says “No.”

The MTT would say “No.”

The Court of Appeals would say “No.”

VI. *WHETHER DAIMLER IS A “CONSUMER” OF MOTOR FUEL WHEN IT TRANSFERS THE FUEL FROM ITS SELF-STORAGE TANK FOR ADDITION TO THE FUEL TANKS OF THE MOTOR VEHICLES IT MANUFACTURERS AND IS A “BULK END USER” AND THUS AN END USER UNDER 2000 PA 403?*

Petitioner-Appellant says “Yes.”

Respondent-Appellee says “No.”

The MTT would say “No.”

The Court of Appeals would say “No.”

***CONCISE STATEMENT OF
MATERIAL PROCEEDINGS AND FACTS***

Petitioner-Appellant, DaimlerChrysler Corporation (“Daimler”) incorporates the entirety of the factual/proceedings statement set forth in its *Application* within this *Supplemental Brief*, and adds the following:

Proceedings Before the Michigan Supreme Court

On June 2, 2006, the Michigan Supreme Court issued an *Order* directing the Court’s Clerk to schedule the matter for oral argument for a determination of whether the Court should grant leave to appeal or issue peremptory relief. The Court’s *Order* outlined a series of issues to be discussed by the parties at oral argument; some of these issues have already been addressed in Daimler’s earlier-filed *Application*, while others are discussed or amplified here. A copy of the Court’s *Order* is appended to this *Supplemental Brief* as Exhibit “1.”

SUPPLEMENTAL ARGUMENT

I. THE MICHIGAN DEPARTMENT OF TREASURY'S OWN ADMINISTRATIVE PRONOUNCEMENTS AND PUBLICATIONS CONFIRM THAT DAIMLER IS ENTITLED TO ITS CLAIMED REFUND OF MOTOR FUEL TAX.

Rarely is a tax litigant confronted with circumstances in which the Michigan Department of Treasury (“the Department”), on its own, has directly refuted the arguments it offers in a case through statements it has made in its own administrative pronouncements and publications – yet that unmistakably is the case here.¹ In the matter at hand, the Department has advanced the notion that the new motor fuel tax (“MFT”) legislation considered here – 2000 PA 403 – is an entirely new statutory formulation, so much so that the Legislature fashioned new exemptions, and determined that certain refund opportunities existing in the formerly-applicable legislation – 1927 PA 150 – were thrown out the window. *In offering this perspective in this case, however, the Department has conveniently disregarded the fact that, in at least three known instances, it has forthrightly stated that all exemptions available under the old enactment have been extended into the new.*

¹ Daimler, in its *Application*, referenced a departmental Letter Ruling, 90-12, as indicative of the Department’s policy regarding whether the automobile manufacturers who place gasoline in the fuel supply tanks of manufactured motor vehicles shipped outside of Michigan are subject to Michigan MFT, and represented that “[t]he Department has not openly repudiated the content of scope of LR 90-12 since its issuance,” *Application*, p 28. However, research undertaken for the preparation of this *Supplemental Brief* discloses that the Department did withdraw LR 90-12 from publication in 2000 [one of twenty-one (21) MFT letter rulings withdrawn, these representing the vast majority of MFT letter rulings extant at the time], but provided no specific reasons for its withdrawal, saying only that Letter Rulings are binding solely with request to the requesting taxpayer, and that Letter Rulings are “periodically” withdrawn when the Department no longer views them as “good examples,” meaning that the Department had determined that they are either obsolete or confusing, *see*, Revenue Administrative Bulletin 2000-6, dated August 18, 2000. Regardless of the Department’s withdrawal of Letter Ruling 90-12, it continues to be the case – as discussed above – that the Department believes that no exemptions available to taxpayers under the former version of the MFTA have been eliminated under the new MFTA.

Two of these administrative pronouncements consist of annual reports compiled and published by the Department's Office of Revenue and Tax Analysis (later, the Bureau of Tax and Economic Policy) relative to its administration of Michigan motor fuel taxes, *see*, Michigan's Motor Fuel and Registration Taxes for the years 2000 and 2003-2004, appended to this *Supplemental Brief* as Exhibits "2" and "3". These annual publications are designed to provide the public with a comprehensive overview of motor fuel revenues and programs. Chapter 7, p 24 of the report issued for the 2000 year, which includes the subheading "Repeal and Recodification of the Motor Fuel Tax Act," states as follows:

Public Act 403 of 2000 repealed and recodified the Motor Fuel Tax Act. This major rewrite of the Act began with a work group composed of industry and government representatives that held meetings for about one year.

The work group had four goals as it proposed a replacement for the current law. The goals were: (1) to implement a dyed diesel fuel program, (2) to minimize any unnecessary regulatory burden on industry while providing the Treasury Department with the information it needs to effectively administer and enforce the motor fuel tax, (3) to prevent tax evasion, and (4) to replace the previous motor fuel tax act with an act that sets forth in a more comprehensive and organized manner the rights and responsibilities of the Department and those regulated by the Act.

A significant portion of the cost of diesel fuel is the combined state and federal tax – about 39 cents per gallon. Because diesel fuel, aviation fuel, kerosene, and heating oil will all power a diesel engine, incentives to evade the tax are greater for diesel fuel than for gasoline. Diesel fuel that is exempt from the tax must be dyed as a means of easily identifying it and thus increase the chances of preventing tax evasions. Additionally, dyed diesel fuel allows those eligible to make tax-free purchases instead of paying the tax at time of purchase and filing for a refund. This is part of the rationale for the dyed diesel fuel program. Dyed diesel fuel programs have been implemented around the country beginning in 1994.

The other changes to the Act clarified the industry licensing and reporting requirement along with departmental enforcement authority.

The Act did not change tax rates, current exemptions or the diesel discount requirements. The Act's fiscal impact was revenue neutral except for any tax collected that had previously been evaded. (emphasis supplied)

Exhibit "3", the MFT report issued in February 2006 by the Tax Analysis Division of the Department's Bureau of Tax and Economic Policy for fiscal year 2003 – 2004 sets forth identical language at p 34.

What do these publications tell us? That the Department – contrary to its assertions in this case that 2000 PA 403 wrought a brand new enactment far different from its predecessor statute in terms of allowable exemptions and bases for refund claims – actually has acknowledged in publicly reporting on its administration of the motor fuel tax that the new Motor Fuel Tax Act ("MFTA"), 2000 PA 403, *as amended*, MCL 207.1001 *et seq.*, made no change whatsoever to previously-available exemptions. That this is so is additionally borne out by the reports' identical statements that 2000 PA 403 is revenue neutral to the extent that tax evasion has been prevented, *i.e.*, no new revenues are generated under the new MFTA by reason of the elimination of any formerly-available exemption. The Department's position in this case, that Daimler is not entitled to claim a refund of motor fuel taxes it was not at all required to pay under 2000 PA 403, is wholly antithetical to both reports' statements that all exemptions from the old enactment have been carried forward to the new, as well as to the reports' references to the "revenue neutrality" which prevails in the new context, for if an exemption or refund opportunity available under the old enactment was not carried over to the new, the new MFTA would not, in any sense, be neutral.

The Department's public concession that all exemptions available under 1927 PA 150 were carried over to the new MFTA also appears in the MFT portion of its website, *see*, http://www.michigan.gov/prINTERfriendly/0,1607,7-121-1750_2143_2153-5952--,00.html, attached as Exhibit "4," which speaks to qualifications for a refund of motor fuel taxes under 2000 PA 403.

In this section, the Department plainly states that

[t]axes on gasoline, aviation fuel and diesel fuel may qualify for a full or partial refund if the fuel is used:

- **For a purpose other than the operation of a motor vehicle on a public road.**
- In a vehicle for transporting school students under a certificate of authority issued by the Michigan Department of Transportation under 1933 PA 254, section 476.5 of the Michigan compiled laws.
- By a person operating a gasoline powered passenger vehicle of a capacity of 5 or more or a diesel powered passenger vehicle of a capacity of 10 or more under a municipal franchise, license, permit, agreement, or grant.
- In a vehicle operated by a community action agency as described in title II of the economic opportunity act of 1964, Public Law 88-452.
- By the federal, state, or local government.
- By private, nonprofit, parochial, or denomination schools for use in school buses used to transport students to and from school and authorized school functions.
- For operating a motor vehicle with a common fuel supply tank from which motor fuel is used both to propel the vehicle and to operate attached equipment.
- In Charter Boats or commercial fishing boats.
- For tax free sales to governmental entities.
- For tax free sales to private, nonprofit, parochial, or denomination schools for use in school buses used to transport students to and from school and authorized school functions. (emphasis supplied)

Notably, this current rendition of available MFT exemptions, released by the Department more than eight (8) months after the effective date of 2000 PA 403, and last updated on July 6, 2005, in unmistakable terms states that a taxpayer may qualify for a refund of motor fuel taxes if it acquires the fuel "for a purpose other than the operation of motor vehicle on a public road," *a purpose that*

is precisely consistent with Daimler's purpose in acquiring the motor fuel for which it has been taxed, and with respect to which it has requested the contested refunds. Once again, the Department's stated position throughout this case – that a taxpayer like Daimler cannot receive a MFT refund under 2000 PA 403 for instances in which gasoline is used for a non-highway purpose – stands in direct contradiction to the Department's public acknowledgement that a taxpayer may, in fact, receive a refund for these identical acquisitions.

These three public pronouncements – and there may well be more of them that have not been discerned – disclose the Department's administrative position that taxpayers who acquire motor fuel for non-highway purposes are eligible to claim a refund of motor fuel taxes paid. Because the cited instances do not involve promulgated rules – because no interpretive MFT rules have been issued since the inception of 2000 PA 403, and a review of the *Administrative Code* reveals that the rules issued with respect to the predecessor statute continue in place – they do not directly invoke the precept that an agency's long-standing interpretation of a statute generally has the force of law and therefore is to be accorded deference, *Danse Corp v Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). Nevertheless, this Court nevertheless should not permit the Department to assert a position in this case that expressly contradicts the manner in which it has stated that it administers the MFTA in its publicly-announced perspectives.

II. AVAILABLE LEGISLATIVE HISTORY RELATING TO THE ADOPTION OF THE NEW MOTOR FUEL TAX ACT, 2000 PA 403, CONFIRMS THAT THE LEGISLATURE DID NOT INTEND TO REMOVE ANY PREVIOUSLY-AVAILABLE EXEMPTIONS OR REFUND OPPORTUNITIES; DAIMLER CLEARLY IS ELIGIBLE TO RECEIVE MOTOR FUEL TAX REFUNDS UNDER THE NEW ACT FOR MOTOR FUEL USED FOR NONTAXABLE PURPOSES CONSISTENT WITH THE REFUNDS IT REQUESTED AND RECEIVED UNDER THE PREVIOUS ENACTMENT, 1927 PA 150.

Courts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of ambiguous provisions. *Florida Leasco, LLC v Dep't of Treasury*, 250 Mich App 506, 508-509; 655 NW2d 302 (2002).² Available bill analyses relating to the passage of 2000 PA 403 confirm that this enactment was not intended to remove existing MFT exemptions, and that it instead served administrative purposes, and was primarily fueled by the need to eliminate opportunities for tax evasion. Stated otherwise, there is nothing about the legislative circumstances surrounding adoption of 2000 PA 403 that even remotely suggests that the Legislature intended to withdraw the refund opportunity that was available to Daimler under the former version of the MFTA; instead, the legislative history clearly points to an intent to sustain formerly-applicable exemptions and refund opportunities.

2000 PA 403, which repealed 1927 PA 150, made its way through the Legislature as SB 1205 during the 2000 legislative session, and was the subject of legislative analyses by the House and Senate fiscal entities. Several of these analyses assist in discerning the intent of the Legislature in enacting the new MFT legislation, for they in certain terms state the reason for elimination of the former MFT structure in favor of the new.

² Note, however, that use of bill analyses to discern legislative intent is not without its hazards or limitations, *see, e.g.*, this Court's observation in *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 588, n 7; 624 NW2d 180 (2001), that bill analyses consist of staff versions that "do not necessarily represent the views of even a single legislator."

Thus, the Committee Summary for SB 1205 dated May 17, 2000, appended to this *Supplemental Brief* as Exhibit “5,” reiterates the Act’s intent [as expressly stated in MCL 207.1008(5)], and talks about what the bill generally would accomplish (such as requiring the supplier to remit MFT; creating a dyed diesel fuel program; and imposing certain administrative requirements ostensibly designed to enhance the Department of Treasury’s ability to effectively administer the tax). Importantly, the analysis specifically states in the “content” portion that “[t]he bill would not change . . . the current exemptions from the tax (except for adding an exemption for duel [sic] use vehicles used on a jobsite),” and further mentions that “[t]he bill would allow the following persons or entities, who paid the tax, to seek a refund of the tax,” including “[a] person who used motor fuel for a nontaxable purpose,” “persons who paid the tax on purchases that were tax-exempt,” and “[a]n end user for gasoline used in an implement of husbandry, or otherwise used for nonhighway purposes not otherwise expressly exempt under the bill.” In addition, the analysis states that the bill “would have an indeterminate fiscal impact on State and local government for the receipt of fine revenue or costs incurred for incarceration” – essentially meaning that, except for the prospect that the Department would have to expend certain administrative costs to engage in the new dyed diesel fuel program, would receive additional tax revenues because opportunities for tax evasion would be reduced, and would slightly increase the amount of MFT retained by the state for placement into the Fuel Tax Evasion Prevention Fund, the legislation is revenue-neutral.

These same concepts are reflected in later analyses, such as the Floor Analysis for SB 1205 substitute S-1 dated May 24, 2000 (Exhibit “6”), and the First Analysis by the Senate Finance Committee dated July 26, 2000 for SB 1205 (S-1), and SBs 1264-1266 (these to amend three acts to conform their provisions to that of the new MFT legislation) (Exhibit “7”).

Daimler submits that the relative “fiscal neutrality” recognized by these bill analyses (and, as we have seen, by the Department as well in its annual MFT reports, Exhibits “2” and “3”), coupled with their express recognition that persons who use motor fuel for a nontaxable purpose continue to be eligible for MFT refunds under the new enactment, just as they were under 1927 PA 150, fully supports its position in this case that it is, indeed, entitled to the MFT refunds it has properly and timely claimed. While these bill analyses may not be conclusive “intent indicators,” to the extent that they completely track the Department of Treasury’s own evaluation of 2000 PA 403 and are consistent with the language of the statute itself, they are reliable and supportive of Daimler’s position in this case.

III. AN EXAMINATION OF CASE LAW GUIDES THE CONCEPT THAT THE LAWFUL IMPOSITION OF MICHIGAN MOTOR FUEL TAX IS DEPENDENT UPON OPERATION OR PROPULSION OF A MOTOR VEHICLE OVER MICHIGAN PUBLIC ROADS OR HIGHWAYS

There is no question in this case that, for the period for which it claimed MFT refunds, Daimler at no time operated or propelled its manufactured vehicles destined for delivery to out-of-state vendors over Michigan public roads or highways. Michigan cases addressed to a variety of MFT issues fully recognize this necessary link between actually using – *i.e.*, driving or propelling – a vehicle on Michigan roads employing motor fuel to combust the vehicle’s engine and incurring liability for payment of MFT. Although all of these cases were decided in the context of the provisions of 1927 PA 150, the “necessary link” between driving or propelling a vehicle on Michigan roads using motor fuel and incurring MFT liability also exists under the present enactment, 2000 PA 403.

In a case that considered a taxpayer’s challenge to the constitutionality of differential tax rates applicable for diesel motor fuel, *Lake Shore Coach Lines, Inc v Secretary of State*, 327 Mich 146, 151; 41 NW2d 503 (1950), this Court specifically recognized that the formerly operative MFTA, 1927 PA 150, imposed a tax upon diesel motor fuel “used or sold to produce power in motor vehicles upon the highways of the State.” The Court characterized the diesel MFT as “aimed at the use of the public facility, the State highways, afforded by the State and is collected for the purpose of maintaining and repairing such highways”,³ *Id at 158*, and focused upon motor

³ Actually, Const 1963, art 9, § 9 mandates that taxes imposed for highway use are to be devoted to highway maintenance:

All specific taxes, except general sales and use taxes and regulatory fees, imposed (cont. from p 17) directly or indirectly on fuels sold or used to propel motor vehicles upon highways and to propel aircraft and on registered motor vehicles and aircraft shall, after the payment of necessary collection expenses, be used exclusively for transportation purposes as set forth in this section. . . .

fuel as fuel that is used for propulsion of a vehicle, *Id at 158-160*. While the Court’s opinion is directed to the “old” MFT legislation, there are no salient differences between the “old” and “new” acts concerning the direct link between imposition of the tax and the taxpayer’s use of the motor fuel in propelling vehicles on Michigan roads and highways, or the fact that motor fuel taxes are (with the exception of a small amount currently dedicated to the motor fuel tax evasion prevention fund administered by the Department of Treasury, *see*, MCL 207.1142) directly earmarked for placement into a transportation fund used to maintain and repair the roads traversed.

Likewise, the Court of Appeals in *Tulsa Oil Co v Dep’t of Treasury*, 159 Mich App 819, 821; 407 NW2d 85 (1987), a case involving the proper formulation of the MFT deduction in computing Michigan sales tax liability, identified the MFTA as providing that the motor fuel tax is imposed upon owners and drivers of motor vehicles for the privilege of using the public roads and highways of the state, and that it is to be imposed on “all gasoline sold or used in producing or generating power for propelling motor vehicles.”

And, in *Ammex, Inc v Dep’t of Treasury*, 237 Mich App 455; 603 NW2d 308 (1999), *lv den*, 463 Mich 885 (2000), *cert den* 534 US 827; 122 S Ct 67; 151 L Ed2d 34 (2001), the Court of Appeals considered a gasoline retailer’s claim for refund of motor fuel taxes paid for fuel purchased at its duty-free facility immediately before the drivers’ entry from the United States into Canada. Citing *Roosevelt Oil Co v Secretary of State*, 339 Mich 679, 685; 64 NW2d 582 (1954), the court viewed the purpose of the MFTA as to ““prescribe a privilege tax for the use of the public highways by owners and drivers of motor vehicles,”” and further observed that a purchaser of gasoline “for a purpose other than the operation of a motor vehicle on Michigan’s public roads and highways may file a claim for a refund of the taxes paid,” *Ammex at 459-460*.

In alluding to the MFTA as inseparably linked to the actual operation of motor vehicles on Michigan public roads and highways, and in recognizing that the fund for which the tax is earmarked is a transportation fund used to repair and maintain the highways on which vehicles are operated, these cases guide resolution of this case. The language of 2000 PA 403 likewise discloses that operation of a motor vehicle on Michigan public roads provides a basis for imposition of the tax, and connects the taxes collected by virtue of actual operation of a vehicle on public roads to a fund used to maintain and repair the roads. In short, under both the old and new acts, one (like Daimler in this context) who does not operate a vehicle over Michigan public roads and highways, and who has thereby not contributed to the disrepair of the roads and highways, should not be made to pay the MFT.

IV. THE IRREBUTTABLE PRESUMPTION STATED IN MCL 207.1026(1) DOES NOT APPLY TO DAIMLER.

Section 26(1) of the MFTA provides:

Except as otherwise provided in section 32, there is an irrebuttable presumption that all motor fuel delivered in this state into the fuel supply tank of a *motor vehicle licensed or required to be licensed for use on the public roads or highways of this state* is to be used or consumed on the public roads or highways in this state for producing or generating power for propelling the motor vehicle. This presumption does not apply to that portion of the motor fuel used or consumed by a commercial motor vehicle outside of this state. (emphasis supplied) MCL 207.1026(1).

The irrebuttable presumption stated in MCL 207.1026(1) does not apply to Daimler for two reasons. First, this provision, by its own terms, applies “except as otherwise provided” in MFTA § 32. Section 32 states that “[i]f a person pays the tax imposed by this act and uses the motor fuel for a nontaxable purpose as described in sections 33 to 47, the person may seek a refund of the tax,” thereby removing taxpayers who have paid the tax but use the motor fuel for a nontaxable purpose from the force and effect of the irrebuttable presumption. As Daimler has contended in its *Application*, and asserts in this supplemental submission, it has paid MFT for motor fuel used for nontaxable purposes described in sections 33 to 47 of the MFTA. As a consequence, it fits within the “except as otherwise provided in section 32” language of MCL 207.1026(1), and the irrebuttable presumption is inapplicable.

Moreover, even if this Court for some reason were to find that Daimler does not fall outside of the irrebuttable presumption, the irrebuttable presumption provision expressly states that it applies only in instances in which “motor fuel [is] delivered in this state into the fuel supply tank of a motor vehicle *licensed or required to be licensed* for use on the public roads or highways of this state.” MCL 207.1026(1) (emphasis added). Daimler’s manufactured vehicles that contain

motor fuel in their supply tanks as part of the industrial process, and that are loaded onto transport trucks and carried to vehicle dealers outside of Michigan, are not licensed or required to be licensed for use on the public roads or highways of Michigan while Daimler has control over the vehicles. There is no requirement that Daimler license these vehicles under the Michigan Vehicle Code, *see*, MCL 257.216(a), which excepts from vehicle registration and titling provisions “[a] vehicle driven or moved upon a highway in conformance with the provisions of this act relating to manufacturers, transporters, dealers, or nonresidents.” Indeed, the vehicles are only subject to licensure after they are transferred to the non-Michigan dealer and either used by that dealer outside of Michigan or purchased by a consumer for use. On this basis, then, the irrebuttable presumption outlined in § 26(1) is inapplicable to Daimler, and if any presumption applies, it is the “rebuttable presumption” of MCL 207.1026(2),⁴ which by its own terms is “subject to proof of exemption under this act.” This means that, whatever the language of the rebuttable presumption, Daimler can show – and has shown in this case – that it qualifies for exemption and therefore is not subject to taxation under the MFTA under the specific circumstances outlined here.

⁴ MCL 207.1026(2) states:

“There is a rebuttable presumption, subject to proof of exemption under this act, that all motor fuel removed from a terminal in this state, or imported into this state other than by a bulk transfer within the bulk transfer/terminal system or delivered into an end user’s storage tank, is to be used or consumed on the public roads or highways in this state in producing or generating power for propelling motor vehicles. This presumption does not apply to that portion of the motor fuel used or consumed by a licensed commercial motor vehicle outside of this state.”

V. THE LEGISLATURE’S USE OF THE PHRASE “AN END USER” IN MCL 207.1039 INCORPORATES ALL TYPES OF END USERS, AND IS NOT INTENDED TO REFER SOLELY TO THE ULTIMATE, OR FINAL, END USER.

In its *Application*, Daimler provided ample argument directed to this question, and does not restate that argument here, but instead takes this opportunity to provide supplemental commentary on the validity of its previously-stated position.

Of course, the primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Statutory language should be construed reasonably, keeping at the forefront the purpose of the act. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). If the statutory language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed, and courts are obligated to apply the statute as written. *In re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). Nothing will be read into a clear statute that is not within the manifest intent of the Legislature as derived from examination of the language of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). MCL 8.3a generally mandates use of the common meaning of a word or phrase unless the word or phrase is technical or has acquired a peculiar meaning in law, in which case it is to be used in accordance with the peculiar meaning:

All words and phrases shall be construed and understood according to the common and approved usage of the language, but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

The use of dictionary definitions to craft the meaning of a word or phrase comports with this statutory mandate that the “common and approved usage” of words selected by the Legislature be applied. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004). With these precepts in mind, we look to the language of 2000 PA 403, and its use of the term “end

user.”

A simple, yet highly relevant definition of end user available from *Wikipedia*, an on-line encyclopedia, is that “[e]conomics and commerce define an end-user as the person who uses a product.” http://en.wikipedia.org/wiki/End_user. From the perspective of this definition, it is clear that, depending upon the circumstances, there may well be more than one end user of a product. As an example, Milton Bradley, a game board manufacturer, may use dice it purchases for use in its fabrication of Monopoly, even though the dice ultimately are also used by those who play the board game after purchase. Under the *Wikipedia* definition of end user, both Milton Bradley, which uses a pair of dice in assembling the game, and any person who thereafter uses the dice to play Monopoly, are end users of the product, simply because both use the dice. In similar fashion, Daimler is an end user of motor fuel used in its manufacturing activities.

It is clear that, had the Legislature intended in the context of the refund provisions of the MFTA to restrict who is eligible to claim a refund to a particular type of end user, it could and would have. In this vein, it could have referred to the “ultimate end user,” or the “final end user” to distinguish, perhaps, between an entity that uses the fuel at some intermediate point, and someone who is the last person to use the fuel. As an illustration, home appliance manufacturers, in issuing express limited warranties for their products, frequently distinguish between the “original or first” end user and subsequent end users. As an example, see Exhibit “8,” a copy of an express limited warranty for the Therma-Stor HI-E DRY Dehumidifier, obtained at <http://www.thermator.com/pdf/serv/Hi-EDryWarranty.pdf>, which extends the warranty solely to the “original end-user” of the appliance, so that any other subsequent user – also an end user, but not the “original end-user” – does not have the benefit of the warranty.

The language of MCL 207.1039, allowing for a claim for refund by an end user, does not

distinguish between the original end user and subsequent end users. If the Legislature wished to make such a distinction, it could have easily adopted language, like that often used in the limited warranty setting, to specify which end user is eligible to claim a refund. The statute does not use the words, “original,” “first,” “final,” or “ultimate” when defining end user, even though these words were available to the Legislature to clearly limit and identify a particular end user. Nor does the enactment state that only certain types of “end users” are eligible to claim refunds – prompting the conclusion that sub-categories of end users such as “bulk end users” and “industrial end users” qualify as “end users” for purposes of obtaining a MFT refund. Absent the existence of any such limiting language, it must be concluded that, with respect to any given circumstance, there are potentially multiple end users who may be in a position to claim exemption from payment of MFT, and “bulk” and “industrial” end users are within the population of “end users” who are permitted to claim refunds of MFT.

VI. DAIMLER IS A “CONSUMER” OF MOTOR FUEL WHEN IT TRANSFERS FUEL FROM ITS SELF-STORAGE TANK FOR ADDITION TO THE FUEL TANKS OF THE MOTOR VEHICLES IT MANUFACTURES. ALTHOUGH THIS IS NOT A “CONSUMPTION” OF GASOLINE THAT SUBJECTS DAIMLER TO THE IMPOSITION OF MOTOR FUEL TAX – BECAUSE IT IS NOT CONSUMPTION OF THE GAS IN OPERATING THE VEHICLE ON MICHIGAN PUBLIC ROADS AND HIGHWAYS – IT IS A CONSUMPTION THAT RENDERS IT A “BULK END USER” AND THUS AN END USER UNDER 2000 PA 403.

In its *Application*, Daimler posited that it qualifies as a “bulk end user,” as defined in MCL 207.1002(f) to mean “a person who receives into the person’s own storage facilities by transport truck or tank wagon motor fuel for the person’s own consumption.” The MFTA sets forth no definition of the term “consumption,” although the commonly-accepted definition of the term is “the act of consuming, as by use, decay, or destruction”; “consume,” in turn, means “to destroy or expend by use; use up.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* (1989). Applying the common meaning of the term “consumption,” it is clear that Daimler in fact “consumes” the motor fuel in its industrial process because it “uses” it as a component of a manufactured automobile. Note, however, that this use, or consumption, for Daimler’s own manufacturing purposes is to be differentiated from the “consumption” of motor fuel that occurs when a vehicle is powered over Michigan public roads and highways. In the former context, Daimler as a “bulk end user” can, in fact, consume motor fuel as part of its industrial activities without using motor fuel in a taxable manner; in the latter context, a “consumer” of motor fuel incurs MFT liability because the fuel is used to propel a vehicle over the roads and highways of this state. As a “consumer” of fuel placed into its own storage facilities, and consistent with assertions it has made throughout its presentations to this Court, Daimler qualifies as a “bulk end user,” and thereby as an end user under 2000 PA 403.

CONCLUSION AND RELIEF SOUGHT

This *Supplemental Brief* is provided to address or expand on issues that were not considered in Daimler's earlier-filed *Application*, or for which additional authority has been discerned. Because Daimler's previous submission amply considered the issues of whether Daimler satisfies the definition of "bulk end user" and "industrial end user" (Issue 3 referenced in Exhibit "1"); whether mere placement of fuel in vehicle tanks is a "nontaxable purpose" under MCL 205.1008(5) (Exhibit "1", Issue 6); and whether MCL 207.1047 was intended as a "catch-all" provision for entities that do not squarely fit within any other category (Exhibit "1", Issue 7), little or no additional argument relative to these issues is set forth in this supplemental submission.

This submission magnifies what is apparent from the discussion set forth in Daimler's *Application*: The Department, without legal justification, and in direct contravention of its own multiple public statements concerning who is eligible for refunds under the new MFTA, 2000 PA 403, has denied Daimler its rightfully-claimed MFT refunds, all exclusively relating to Daimler's non-highway use of motor fuel. Now is the time to end the Department's egregious, continuing manipulation of this taxpayer, through a simple declaration by this Court of what is evident -- that Daimler is an end user of fuel and is fully eligible to receive refunds of MFT paid for gasoline dedicated to a non-highway use.


The reasons set forth in Daimler's *Application for Leave to Appeal*, as supplemented by the materials set forth in this *Supplemental Brief*, illustrate multiple, appropriate grounds under MCR 7.302(B)(1),(2), (3), and (5) upon which this Court should grant the *Application*, and permit Daimler to appeal from the Court of Appeal's *Opinion* dated November 1, 2005. In the alternative, they present clear and cogent authority for awarding Daimler peremptory relief in the form of an

order issued by the Court to reverse the erroneous determinations of the Court of Appeals and the Michigan Tax Tribunal.

Respectfully submitted,

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